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Caselaw to Court: Ethical Considerations for Prosecutors

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CASELAW TO COURT:

ETHICAL CONSIDERATIONS FOR PROSECUTORS

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Vouching

State v. Starks, 492 P.3d 362 (App 2021)

Starks was charged with sex crimes against a child under 15. His first trial ended in a hung jury; in his second trial, he was convicted of child molestation and indecent exposure to a minor under 15, and acquitted of sexual abuse. Division 2 reversed.

- The trial court erred in allowing the State to elicit testimony from the cold expert that created a profile of a perpetrator by detailing conduct common to perpetrators; further, the error was not harmless;
- The trial court properly granted the State's motion to amend the indictment to conform to the evidence by altering the range of dates for the offenses by a year;
- After the defendant implied in his closing argument that the State should have presented other evidence, the State did not engage in improper vouching by arguing in its rebuttal that there was no other evidence and that, even if there were, the defendant could have obtained and presented it.

The COA noted testimony by a cold expert about how children perceive sexual abuse, behaviors involving disclosure of abuse, and circumstances in which children may make false allegations is generally admissible, but the State may not offer profile evidence as substantive proof of the defendant's guilt. Profile evidence tends to show that a defendant possesses an abstract of characteristics typically displayed by persons engaged in a particular kind of activity, and suggests because the defendant has those characteristics, a jury should conclude he must have committed the crime. The COA found in this case the expert's response to the prosecutor's question about perpetrator strategies described a profile of a sexual abuser; the expert did not attempt to explain any victim behavior but simply listed things that sexual abusers commonly do to establish a relationship with the victim to enable the sexual abuse. The COA concluded because the questioning and testimony focused on the behavior

of perpetrators and lacked the larger context of victimization, the trial court erred in admitting the challenged profile testimony. Further, the error was not harmless and thus Starks is entitled to a new trial. The COA reached the remaining issues in the event of retrial. First, the trial court did not err in allowing the State to amend the indictment to conform to the evidence to correct the date of the offenses by a year. Although that is longer period time than has been approved in previous cases, the COA saw no meaningful distinction. Starks was put on notice from testimony in his first trial that resulted in a hung jury; further, the date change did not alter the nature of the offense and Starks had shown no prejudice. Second, the State did not engage in vouching. In his closing argument, Starks suggested the State had not presented evidence it should have; in rebuttal, the prosecutor stated that “if there was other evidence I could present to you I would have, as the government. There isn’t any.” The prosecutor further remarked that “if there was something that he thought was important,” Starks could have obtained it via subpoena and presented it. The COA concluded nothing in these statements personally assured a witness’s veracity, and the prosecutor’s remarks were permissible to rebut Starks’s implication that there was other evidence the State should have presented. [CR20190288Opinion.pdf \(az.gov\)](#)

State v. Bolivar, 250 Ariz 213 (App 2020)

Bolivar was charged with numerous sex crimes against his stepdaughter, committed over 10 years when she was between 5 and 15 years old. On the second day of trial, the victim’s mother and her boyfriend were viciously attacked by two armed men; the incident resulted in media attention. Before the jury began deliberating, the trial court amended the information to charge two counts in the alternative to the count of continuing sexual abuse of a child, and instructed the jury accordingly; Bolivar was convicted, among other crimes, of the alternate counts and acquitted of continuing sexual abuse of a child. Division 2 has affirmed the convictions and sentences.

- It is not improper for the State to describe the complaining witness as the “victim” when the issue is whether a crime has been committed.
- Trial court did not err in denying a motion for change of venue without individually questioning jurors about whether they saw a newspaper article related to the case, where the court repeatedly admonished the jurors to avoid exposure to media coverage of the case and to come forward and inform the court if exposed.
- Under § 13-1417(D), any separate felony sex crime that is temporally and factually included within a charge of continuous sexual abuse of a child must be charged in the alternative; where such crimes are not originally charged in

the alternative, the information may be amended under Rule 13.5(b) before the jury starts deliberating.

- Evidence was sufficient to show the defendant knew the victim did not consent to the sexual contact alleged in counts of sexual abuse and sexual assault, based on the victim's direct testimony as well as her testimony of a 10-year history of abuse by an authority figure and the measures she had taken to avoid sexual contact.
- Former version of A.R.S. § 13-1407(E) is not unconstitutional in treating lack of sexual motivation as an affirmative defense which a defendant must prove.

First, the COA held that *Z.W. v. Foster* does not establish that the term "victim" is inappropriate when the defendant disputes whether a crime occurred; rather, trial courts should have flexibility in determining how to refer to crime victims during criminal proceedings. Further, there is no authority supporting the notion that the term "victim" is prohibited when the State's key evidence is the testimony of the alleged victim. In any event, here, other witnesses also testified as to the alleged crimes. The COA also held that any error was harmless beyond a reasonable doubt, as the trial court instructed the jury that the victim's initials were the initials of the "alleged victim;" that every defendant is presumed by law to be innocent; that Bolivar had pleaded not guilty, meaning the State must prove every part of the charge beyond a reasonable doubt; and that statements or arguments by the lawyers in the case are not evidence. Finally, the COA held the trial court's use of the term "victim" did not constitute an improper comment on the evidence. The COA itself referred to the victim as "Becca" throughout its opinion.

Second, the COA held that the trial court did not err in failing to individually question jurors as to whether they had seen a newspaper article which reported the trial court's finding that Bolivar was responsible for the attacks on the victim's mother and her boyfriend, or in denying Bolivar's motions for change of venue, mistrial, and new trial based on same. Only one juror saw the article but avowed it would not influence his decision, and that juror was later designated as an alternate and did not participate in deliberations. The COA distinguished SCOTUS case law in that those cases involved pretrial publicity and its effect on prospective jurors who were under no obligation imposed by taking an oath or by judicial admonition. The COA concluded that absent an allegation that other jurors had read the newspaper, the trial court was not required to question them about exposure to the article.

Third, the COA explained under § 13-1417(D), any separate felony sex crime that is temporally and factually included within a charge of continuous sexual abuse of a

child must be charged in the alternative. Here, the State charged continuous sexual abuse of a child in Count 1, and also two other counts consisting of conduct included in that charge. Before the jury started deliberating, the trial court proposed modifying the verdict forms and jury instructions to reflect the alternative nature of Count 1 and the other two charges, and the State agreed; the jury found Bolivar guilty of all counts except Count 1. The COA held that so long as those counts were charged in the alternative before the jury began deliberating, the information was properly amended under Rule 13.5(b), noting that the jury was informed before deliberations that the information had been amended to charge those counts in the alternative in compliance with § 13-1417(D). This amendment did not change the nature of the underlying offenses; Bolivar was not convicted of an offense with which he had not been charged and he was on notice of all the charges against him.

Fourth, the COA held that the evidence was sufficient to show Bolivar knew the victim did not consent to the sexual acts underlying charges of sexual abuse and sexual assault, noting the victim's testimony directly related to the crimes, as well as her testimony about the history of abuse and the measures she had taken to avoid sexual contact with Bolivar.

Finally, the COA rejected Bolivar's claim that he was deprived of due process under the version of A.R.S. § 13-1407(E) in effect at the time of his trial because it placed the burden of proving lack of sexual motivation on the defendant for sexual abuse and child molestation. In *State v. Holle*, ASC determined that this statutory scheme does not violate due process, and the COA is bound by ASC's decision.

<https://www.appeals2.az.gov/decisions/CR20180088Opinion.pdf>

State v. Morgan, 248 Ariz 322 (App 2020)

Morgan sexually abused his 10-year-old daughter in numerous ways, including making her manipulate his testicles as he masturbated and providing her with vibrators to insert in her vagina. He was convicted at trial for multiple counts of sexual conduct with a minor, child molestation, furnishing obscene or harmful items to a minor, public sexual indecency to a minor, and luring a minor for sexual exploitation, and sentenced to life plus consecutive sentences. Division 2 modified one of his convictions for sexual conduct with a minor to the lesser-included offense of child molestation, vacated one of the convictions for furnishing obscene or harmful items to a minor, and affirmed the trial court's order indefinitely retaining jurisdiction over restitution for the victim's future counseling expenses.

- Prosecutor's remark during closing argument that the charged offenses were not "everything [the defendant] did" to the victim referenced properly admitted aberrant sexual propensity evidence and did not amount to vouching.
- Evidence that the defendant caused the victim to manipulate his testicles was insufficient to support conviction for sexual conduct with a minor, which requires oral sexual contact or sexual intercourse, but supported conviction for lesser-included offense of child molestation, which requires only sexual contact.
- A plain vibrator does not qualify as an item harmful to minors so as to support a conviction for furnishing obscene or harmful items to a minor.
- In criminal cases, the trial court may reserve jurisdiction over future restitution requests for counseling and other expenses without setting a hard deadline.

With respect to the claim of vouching, the prosecutor's remarks referred to properly admitted evidence of "other crimes, wrong, or acts" that were "relevant to show that [Morgan] had a character trait giving rise to an aberrant sexual propensity to commit the offense charged."

With respect to furnishing obscene or harmful materials to a minor, the COA explained that the provisions of § 13-3506, taken together, require that the furnished material depict or describe a patently offensive description or representation of ultimate sexual acts, masturbation, excretory functions, sadomasochistic abuse, or lewd exhibition of the genitals. The COA held that the device provided here, a featureless metallic cylinder with a rounded point at one end, did not qualify as an item harmful to minors.

With respect to restitution, the COA noted that the under the Victims' Bill of Rights and enabling legislation, a victim has a right to receive prompt restitution for criminal conduct that caused the victim's loss or injury, in the full amount of the economic loss as determined by the court. Further, caselaw holds that because mandatory restitution is intended to make the victim whole, the victim's economic loss includes losses incurred after sentencing. The COA declined to overturn this caselaw to hold that restitution is limited to losses that have already been incurred by the sentencing date. The COA further held that the authority to reserve jurisdiction to order restitution is implicit in the court's obligation to issue restitution orders for the full amount of the victim's economic loss. Although that authority is generally exercised at sentencing, § 13-603(C) is silent as to when restitution must be assessed, and

caselaw holds that a court may expressly retain jurisdiction to order restitution beyond sentencing. The COA noted that contrary juvenile caselaw is distinguishable because different restitution statutes and policy considerations apply in juvenile cases. Finally, the COA held that the trial court's plan for future restitution awards was reasonable, and did not impermissibly encroach on Morgan's right to a civil trial on money damages. Morgan's interest in finality was not thwarted by the court's decision, as his lengthy sentence attenuates any such interest and does not overcome the interest in making L.M. whole.

<https://www.appeals2.az.gov/decisions/CR20180127%20Opinion.pdf>

Fundamental Error

State v. Vargas, 249 Ariz 186 (2020)

Vargas was convicted of various offenses and argued on appeal that the prosecutor engaged in a pervasive pattern of misconduct that cumulatively deprived him of his right to a fair trial. Since counsel did not object at trial, appellate counsel argued the COA should review the claim of cumulative misconduct for fundamental error; he did not argue that each allegation standing alone was fundamental error but that when the cumulative effect is considered, Vargas was denied his right to a fair trial. The COA held that because Vargas failed to set forth an argument of fundamental error for each allegation, he waived argument that error occurred. ASC vacated the COA's decision and remanded for redetermination.

- A defendant claiming fundamental error due to cumulative prosecutorial misconduct does not have to assert fundamental error for every allegation in order to preserve for review the argument that misconduct occurred, disapproving *State v. Moreno-Medrano*.

To harmonize AZ case law and preclude any confusion regarding the showing a defendant must make when claiming cumulative error based on prosecutorial misconduct, ASC initially directed litigants and appellate courts to utilize the framework set forth in *State v. Escalante*: The first step in fundamental error review is determining whether error exists; if it does, an appellate court must decide whether the error is fundamental. A defendant establishes fundamental error by showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that

he could not possibly have received a fair trial. If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice. If the defendant establishes the third prong, he has shown both fundamental error and prejudice, and a new trial must be granted. The defendant bears the burden of persuasion at each step. Consistent with the third prong of Escalante, a defendant claiming cumulative error based on prosecutorial misconduct need not separately assert prejudice since a successful claim necessarily establishes the unfairness of a trial. But if a defendant simply asserts a general claim of error on appeal and fails to develop it, a court is not obligated to consider it. Accordingly, where a defendant raises a claim on appeal that multiple incidents of prosecutorial misconduct, for which he failed to object, cumulatively deprived him of a fair trial, consistent with Rule 31.10(a)(7) and Escalante, the defendant must: (1) assert cumulative error exists; (2) cite to the record where the alleged instances of misconduct occurred; (3) cite to legal authority establishing that the alleged instances constitute prosecutorial misconduct; and (4) set forth the reasons why the cumulative misconduct denied the defendant a fair trial with citation to applicable legal authority. The defendant is not required to argue that each instance of alleged misconduct individually deprived him of a fair trial. Likewise, a defendant need not argue that the trial court committed fundamental error by failing to sua sponte grant a new trial in each instance. To the extent that *State v. Moreno-Medrano* could be read to mean that appellants must explicitly argue “fundamental error” to preserve review of each assertion of error in support of their claim, ASC rejected that view as overly formulaic.

<https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2020/State%20v%20Vargas%20Opinion.pdf>

State v. Murray, 250 Ariz 542 (2021)

The Murray brothers were tried jointly for aggravated assault. During his rebuttal closing argument, the prosecutor told the jurors that if they were thinking that one or both defendants “might be” guilty but were not sure, “is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt? Because why else would you say that were you not convinced by the State’s evidence? So when you hear yourself say that, ask yourself the second question why, why do I think he is guilty? Because he is guilty because you have been convinced by the State’s case beyond a reasonable doubt. That’s why you think as you do being fair and impartial.” Defense counsel did not object nor did the court comment on or correct the statement. The court later instructed the jury to review the written instructions, which included the correct reasonable doubt standard, reminded them

to follow the instructions, and advised that the lawyers' closing arguments were not evidence. Both brothers were convicted and appealed complaining of prosecutorial misconduct, and the COA affirmed in separate opinions. ASC accepted review, vacated the convictions, and remanded for new trials.

- Prosecutor's single material misstatement of the reasonable doubt standard during rebuttal argument constituted fundamental and prejudicial error and was not amenable to cure by the court's jury instructions or the presumption that the jury followed their instructions.

ASC noted that the prosecutor's misstatement in this case was better characterized as inadvertent error rather than intentional misconduct, and cautioned that prosecutors should heed the lesson that dilution of the reasonable-doubt standard may have consequences for the outcomes of their cases, and potentially their standing with the state bar. ASC held that the fundamental error review paradigm set forth in *State v. Escalante* is the appropriate framework to assess whether a prosecutor's single, unobjected-to misstatement of the reasonable doubt standard warrants a new trial. As applied to this case, ASC held, first, that the prosecutor's misstatement of the reasonable-doubt standard constituted error because it conflated the reasonable-doubt standard with a belief that the defendants "might be guilty," relieving the prosecution of its constitutionally required burden. Second, ASC held that under the totality of the circumstances, the error was fundamental both because it went to the foundation of the case and deprived defendants of an essential right. Third, ASC held that the error was prejudicial because a reasonable jury could have plausibly and intelligently returned a different verdict, and on this record, it was not amenable to cure by the court's jury instructions or the presumption that the jury followed their instructions. ASC explained that the prosecutor's improper argument equating "might be guilty" with proof beyond a reasonable doubt went to the foundation of the defense, whose strategy hinged on exploiting witness credibility issues. Against this evidentiary backdrop, the prosecutor diluted the reasonable doubt standard during his rebuttal argument when his words – the last ones the jury heard from the parties – would be most impactful. ASC concluded that the prosecutor did not merely misstate the proper reasonable-doubt standard, but provided the jury a logical roadmap to circumvent it while ostensibly following it. CR190368PR.pdf (azcourts.gov)

***State v. Robertson*, 249 Ariz 256 (2020)**

Robertson and the State entered into a plea agreement stipulating to a prison term for manslaughter and a consecutive term of probation for child abuse. Robertson later violated probation and was reinstated several times. At her final violation hearing, she complained for the first time that the crimes of manslaughter and child abuse constituted a single act involving a single victim and thus consecutive sentencing amounted to double punishment in violation of § 13-116. The trial court revoked probation and sentenced her to imprisonment. The COA held that Robertson invited and thus waived any error resulting from negotiated stipulations in a voluntary plea agreement. ASC accepted review, vacated that opinion, and remanded to the COA for consideration of Robertson's appeal concerning the legality of her sentence under § 13-116.

- The invited error doctrine may apply to stipulated plea agreements only where it is clear from the record that the defendant not only agreed to the error but either initiated it or actively defended it.
- Although the invited error doctrine may apply to stipulated plea agreements in limited circumstances, a court cannot apply the invited error doctrine to prevent review of a potentially illegal sentence stemming from a stipulated plea agreement.

First, ASC noted that a pleading defendant who is sentenced to prison following a probation violation hearing does not receive a sentence pursuant to the plea agreement, but rather as a consequence of the probation violation; thus, the defendant is entitled to appeal a contested probation violation and sentence.

Second, ASC explained the invited error doctrine prevents a party from injecting error into the record and then profiting from it on appeal. But the doctrine should not be applied unless it is clear from the facts that the party asserting the error on appeal is responsible for introducing the error into the record. ASC noted that courts must be cautious in applying the doctrine because its application precludes appellate relief even when error is fundamental and prejudicial. The invited error doctrine applies only if the party asserting the error is the source of the error; although the party urging the error need not always be the initial party to propose it, the record must be clear that the party urging the error engaged in affirmative, independent action to create the error or argue in favor of it. In the context of stipulated plea agreements, the invited error doctrine should apply only where the party took independent affirmative unequivocal action to initiate the error or actively defended

the error and did not merely fail to object to the error or merely acquiesce in it. ASC noted that given the unequal bargaining power between the State and a defendant, the latter is usually in no position to dictate that specific terms be included in plea agreements.

Finally, ASC held that a court cannot apply the invited error doctrine to prevent review of a potentially illegal sentence; to do so would confer on the courts authority to impose an illegal sentence in contravention of Arizona cases and statutory law concerning illegal sentences. ASC noted that the prohibition on illegal sentences is well-settled, and the State may not rescind a plea agreement because an illegal term is excised from the agreement.

<https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2020/CR190175PR.pdf>

Batson

State v. Ross, 250 Ariz 629 (App 2021)

After a Batson challenge to the peremptory strike of the only African American potential juror on the panel, the State offered as grounds: (1) the juror was “extremely inarticulate” and (2) had “blessed” Ross when entering the courtroom by making the sign of the cross with his cane and nodding good luck. The prosecutor avowed to having observed the “blessing,” but no one else saw it and there was no other evidence of it occurring. The court rejected both grounds as unsupported by record evidence, but found the “blessing” explanation race-neutral, denied the Batson challenge, and dismissed the juror. Ross was convicted as charged. On appeal, Division 1 found the trial court erred in denying the Batson challenge and remanded for a new trial.

- The prosecutor’s avowal describing purported physical acts in the courtroom by a prospective juror did not constitute record evidence sufficient to defeat a Batson challenge; since there was no record evidence allowing the court to conclude it was a race-neutral explanation for the strike, the court erred in denying the Batson challenge and striking the juror.

First, the COA disagreed that the trial court’s rejection of the State’s “extremely inarticulate” explanation was an implicit finding that it was a pretext for racial discrimination, thereby rendering the “blessing” explanation unconstitutionally

tainted. The COA noted that a finding that an explanation is not supported factually does not constitute a finding that the explanation was discriminatory.

Second, the COA explained that resolving a Batson challenge turns on the court's determination based on record evidence; the court then evaluates the facts to determine whether a party engaged in purposeful discrimination. In making this fact-intensive inquiry, the court must consider all the evidence that bears on the issue of racial animus. The COA noted that an avowal by an attorney is not evidence.

Further, record evidence of the "blessing" easily could have been obtained during voir dire of the juror; depending on his answers, the State could have challenged the juror for cause. By the time the State raised the issue, the record contained no evidence of the purported blessing, and the time to make such an evidentiary record had passed. In responding to a Batson challenge, the State had the burden to offer an explanation that, if dependent on conduct by a potential juror that purportedly occurred in the courtroom, was supported by the evidentiary record. Ross then had the burden to offer evidence, not mere inference, to show that the peremptory strike was a result of purposeful racial discrimination. The COA noted that such a burden becomes impossible for a defendant to meet if the proffered explanation rests only on a disputed avowal describing courtroom conduct not reflected in the record evidence and not seen by anyone else. Requiring record evidence supporting a challenge based on in-courtroom physical conduct by a prospective juror allows the inquiry to focus on whether the explanation is race-neutral. Given that evidentiary void, the COA concluded that no factual basis for the purported "blessing" explanation existed. As with the "extremely inarticulate" explanation, there was no record evidence supporting the "blessing" explanation. Because neither explanation the State offered was supported by the record, the trial court erred in finding the State had offered a proper race-neutral explanation for the peremptory strike.

CR19-0214 - Ross.pdf (azcourts.gov)

***State v. Porter*, 251 Ariz 293 (2021)**

Porter, an African American, was charged with assaulting a police officer and resisting arrest. During jury selection, the prosecutor used peremptory strikes on the only two African American venire members and Porter raised a Batson challenge. The prosecutor said she struck one juror because (1) the juror's brother had been convicted of a crime similar and (2) the juror did not seem to be very sure with her responses as to whether her brother's conviction would impact her ability to be impartial. The prosecutor struck the other juror because she had been the

foreperson in a previous criminal case resulting in acquittal. The trial court denied the Batson challenge because the prosecutor had articulated reasonable race-neutral explanations for its peremptory strikes. Porter was convicted of resisting arrest. The COA reversed, but ASC affirmed the trial court.

- When a Batson challenge is raised, neither federal nor Arizona law requires the trial court to expressly address a demeanor-based justification when two race-neutral reasons are offered, the non-demeanor-based one is explicitly deemed credible, and there is no finding that the remaining demeanor-based justification is pretextual..

First, ASC joined SCOTUS and most federal courts in concluding that the express-finding requirement is inapplicable in cases where a demeanor-based and a non-demeanor-based justification are offered and neither is clearly pretextual, and found the same was true of Arizona's Batson jurisprudence.

ASC next held that Porter waived the issue of whether the trial court erred when it failed to conduct a comparative analysis of the jurors.

Finally, ASC applied its own Batson analysis, noting that the trial court considered the prosecutor's explanations, the parties' other strikes, and the court's notes in finding the prosecutor's justifications for striking both jurors were reasonable and not made with purposeful discriminatory intent. In fact, the trial court stated it was reasonable for the prosecutor to want to eliminate one juror whose close family member was convicted of an offense similar to the charge in this case, and another who may have a stronger personality or be more willing to acquit a defendant. In light of these express credibility findings, ASC noted it must assume the trial court implicitly determined the demeanor-based justification concerning the first juror's impartiality was likewise not pretextual. The trial court thus satisfied its obligations under federal and Arizona Batson jurisprudence. ASC emphasized the importance of context; key factors to consider include a pattern of striking all minority prospective jurors, the prosecutor's disparate questioning of jurors, side-by-side comparisons of struck and non-struck jurors, the prosecutor's misrepresentations of the record, and the relevant history of the prosecutor's peremptory strikes in past cases. Further, trial judges, who are in a better position to discern the intent and demeanor of prosecutors and jurors, are uniquely situated to determine whether peremptory challenges are being used to discriminate against minority jurors. ASC noted that although express findings are not required, it nonetheless encouraged trial courts to make them as they will bolster their rulings and facilitate review on appeal. But in

this case, ASC found that taken together, the trial court did not clearly err.
CR200147PR.pdf (azcourts.gov)

State v. Smith, 250 Ariz 69 (2020)

Smith shot and killed his ex-girlfriend and then shot his infant daughter in the thigh, causing a fractured femur that required a body cast. The victim had previously been assaulted when she was 7 months pregnant at Smith's behest. CSLI obtained via court order under § 13-3016 showed that Smith's friend near the area where the victim was attacked and that Smith and his friend were together near Smith's apartment immediately afterward. CSLI also showed that Smith arrived at victim's apartment shortly before he drove her and the baby to the hiking trail where he shot them. Smith was convicted of first-degree murder and child abuse, and sentenced to death. ASC upheld the convictions and sentence in a lengthy opinion addressing the following issues:

- Although the CSLI court order was not the functional equivalent of a search warrant, the good faith exception applied where police obtained CSLI in good faith reliance on § 13-3016; further, Riley does not apply to CSLI because CSLI contains only records about location, not content.
- Because CSLI does not involve a warrantless entry into a person's home, the Arizona Constitution does not provide greater protection than the Fourth Amendment; further, the good faith exception still applies.
- Lack of prior notice under § 13-3016 is not grounds for suppression where defense counsel was notified and there was a reasonable basis for the court to conclude that delayed notification was necessary to protect the investigation.
- Defendant was not denied due process right to oppose application for CSLI order where he was given a full and fair opportunity to suppress this evidence at an evidentiary hearing.
- Rule 15.2(g) does not provide the exclusive means for obtaining records and information in the possession or control of a third party; CSLI is in the possession of cell phone providers, not the person in possession of the phone.
- No violation of Sixth Amendment right to counsel where counsel was provided copies of the CSLI and had an opportunity to suppress this evidence at an evidentiary hearing.
- Although the use of a single photograph is inherently suggestive, pretrial identification is still reliable under the totality of the circumstances where the witness clearly saw the suspect, the witness's attention was directed at the suspect, and the witness was certain in her identification, even if the witness

did not provide any description of the suspect before the unduly suggestive procedure.

- Trial court did not err in denying Batson challenge where the State offered race-neutral reasons for preemptively striking jurors based on medical hardship and reluctance to impose the death penalty.
- Trial court did not err in admitting a video that demonstrated the location of the defendant's and the victim's cell phones the day of the murder; although CSLI can only show location of a cell phone within 1.5 miles of a cell tower and cannot track the specific path a cell phone travels between cell towers, inaccuracies in a video goes to the weight of the evidence, not its admissibility, and were clarified through witness testimony.
- Defendant was not denied confrontation rights where he was given broad latitude in impeaching the credibility of a case agent who was demoted for dishonest timekeeping practices, but not allowed to question the case agent about the State's decision to not charge him for theft, where the defendant failed to show any good faith basis for his claim that the State may have tried to elicit favorable testimony in exchange for leniency.
- Trial court erred by instructing the jury at the beginning rather than at the close of the aggravation phase of capital proceedings; but error was not prejudicial and thus not fundamental.
- Substantial circumstantial evidence showing that the defendant murdered the victim to avoid paying child support was sufficient to support finding that defendant committed the murder for pecuniary gain.
- Conviction for intentional or knowing child abuse against a victim under age 15 is a dangerous crime against children and qualifies as a serious offense aggravator; trial court need not instruct the jury to determine whether the offense was committed against a child where proof of the underlying crime necessarily included a finding that the offense was committed against a child.
- Trial court did not err by instructing the jury that it could consider mitigation only "so long as" it related to the defendant's character, propensity, history or record, or circumstances of the offense.
- Trial court did not err in advising the jury that they could grant mercy only if the evidence supported it.
- Trial court did not err in allowing mitigation rebuttal by the State's expert, a forensic psychologist, regarding the defendant's mental health, relationship to the victim, and actions leading up to the murder.
- Trial court did not err in admitting comments by State's mitigation expert that were relevant to the issue of whether there was mitigation sufficiently

substantial to call for leniency, where the comments were more probative than prejudicial.

- Prosecutor did not commit misconduct by: obtaining the CSLI Order from the IA Court rather than the judge assigned to the case; properly stating that the child abuse conviction was a serious offense; urging the jury to consider the child abuse conviction as an aggravator for capital sentencing purposes; or telling the jury during closing argument that the defendant probably assaulted the victim in the attack that occurred prior to the murder where such statements were based on reasonable inferences from the evidence.
- Trial court did not coerce a death verdict by giving the jury an impasse instruction after the jury claimed it could not reach a verdict where the court did not know the numerical split among jurors, the jury deliberated for only a short time before reaching an impasse, and the court reiterated several times that it was not trying to displace the jury's judgment and explained that the jury had as long as they liked to deliberate and that it was fine if the jury thought the time already spent was sufficient.

<https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2020/CR180295AP.pdf>

State v. Dunbar, 249 Ariz 37 (App 2020)

Dunbar went to his ex-girlfriend's apartment complex and waited for her in the parking lot. When she came home, he pulled his car in front of hers to keep her from leaving; when she refused to speak to him, he shot her multiple times. He was convicted of attempted murder, weapons misconduct, kidnapping, and aggravated assault. Division 2 upheld the conviction but vacated his sentences and remanded for resentencing.

- A defendant asking to represent himself on the morning of trial after persistently vacillating did not make an unequivocal request to represent himself, and forfeited his right to self-representation.
- Trial court did not err in denying the defendant's wide-ranging, unlimited request for the victim's mental health records where the defendant did not provide a sufficiently specific basis for the relevancy of those records to his defense.
- Trial court erred in imposing enhanced sentences on the basis of prior foreign felony weapons convictions that did not include every element required to prove an Arizona enumerated offense.

- Trial court erred in imposing aggravated sentences based on ineligible foreign convictions and in the absence of a statutory aggravating factor found by the jury, admitted by defendant, or implicit in the verdict.
- Trial court erred in imposing consecutive sentences for attempted murder and weapons misconduct where it was factually impossible for the defendant to shoot the victim without also committing weapons misconduct.

First, Dunbar complained the trial court erred in denying his request to represent himself the morning of trial. The COA held, as a matter of first impression, that although Dunbar's request to represent himself was timely, it was not unequivocal because the record showed that Dunbar had vacillated throughout the proceedings and thereby forfeited his right to self-representation. Next, Dunbar complained the trial court erred in denying his request for the victim's mental health records. The COA noted that Dunbar sought records spanning 15 years from 3 states, and failed to provide a sufficiently specific basis for requiring them. He did not explain how the broad assertion that the victim was delusional would support his misidentification defense; moreover, he later changed his claim of misidentification to one of self-defense. Regarding the enhanced sentences, Dunbar was sentenced as a repetitive offender for three of his convictions based on New York felony weapons misconduct convictions. The COA explained that despite 2012 legislative changes regarding most foreign offenses, the comparative element approach still applies to a felony weapons possession violation. Here, the New York offenses did not have the same elements as any enumerated Arizona offense and thus could not be used to enhance Dunbar's sentences. Regarding the aggravated sentences, Dunbar was sentenced to the maximum sentence on all counts; the COA found the trial court erred in doing so on two of them. The State conceded that the jury did not find lying-in-wait or emotional harm to the victim as aggravating circumstances and these aggravators were not implicit in the verdict or admitted by Dunbar, leaving only the prior felony convictions. Since the foreign offenses did not include every element that would be required to prove an enumerated offense in Arizona, they did not qualify as an aggravator. Finally, regarding the consecutive sentences, the COA found that the trial court properly imposed consecutive sentences for attempted murder and kidnapping, but erred in imposing consecutive sentences for attempted murder and weapons misconduct because under the facts of this case, it was factually impossible for Dunbar to shoot the victim without also committing weapons misconduct because he was a prohibited possessor and the use of the gun would necessarily constitute weapons misconduct.

<https://www.appeals2.az.gov/decisions/CR20180064Opinion.pdf>

Representation

State v. Johnson, 250 Ariz 230 (App 2020)

At the beginning of the first day of trial, Johnson said he wished to dismiss appointed counsel. The court noted it was not the juncture at which to do so, and stated: “You certainly don’t want to represent yourself today.” Johnson interjected, “Yes, I do.” The court stated it was too late, and that it had heard no grounds for dismissing counsel. After reviewing several papers from Johnson, the court advised Johnson that he would have the chance to tell his story if he chose to testify with the advice of counsel and explained that he would have the opportunity to ask questions through counsel. The court also described the trial process and again advised Johnson of his right to testify before calling the potential jurors for selection. For the remainder of trial, Johnson did not renew his request to represent himself. Division 2 vacated the ensuing conviction.

- Denial of the right to proceed pro se by refusing to permit a defendant to waive counsel, without further inquiry, violates the defendant’s constitutional rights and is reversible error.

The COA explained that the right to counsel includes the right to proceed without counsel. A defendant must timely and unequivocally invoke the right and, unless the request was made for the purpose of delay, a trial court must grant a timely request if the defendant’s invocation is knowing, voluntary, and intelligent. A request made before the jury is empaneled is timely. And a defendant’s request to proceed pro se triggers the court’s protective duty to ascertain whether a waiver of counsel is intelligent, knowing and voluntary. The court may not refuse to consider the defendant’s request altogether.

First, the COA held that Johnson’s request to proceed pro se was unequivocal. Second, the COA held that it was unclear whether the trial court had ruled on Johnson’s request to proceed pro se, but its statement reasonably could be interpreted as denying the request. But even assuming the trial court disregarded Johnson’s request, the burden was not on Johnson to further pursue the matter. The COA decided that waiver case law did not apply here, and even if it did, Johnson’s failure to obtain a ruling would mean only that the COA would instead review his claim for fundamental, prejudicial error. The COA distinguished case law addressing failure to get a ruling on a motion in limine, not the fundamental constitutional right of self-representation which the defendant cannot exercise until the court

undertakes the necessary colloquy to ensure the waiver of counsel is constitutionally valid. Further, Johnson could have interpreted the trial court's statements following his request as denying that request, and thus there was no obvious reason for him to believe he needed to pursue an additional ruling from the court. The COA declined to conclude that Johnson's acquiescence to proceeding to trial with counsel effectively withdrew or waived his request to proceed pro se. The COA cautioned that trial courts must promptly rule on defendants' motions to represent themselves to avoid the defendant incorrectly assuming the motion has somehow been denied when the defendant wants to pursue the right of self-representation. The COA also emphasized that counsel for either the State or defendant could have confirmed whether the court had addressed Johnson's request or encouraged it to give the request the required attention.

<https://www.appeals2.az.gov/decisions/CR20190101Opinion.pdf>

***State v. Duffy*, 251 Ariz 140 (2021)**

Duffy and his codefendant were set for trial together on drug charges, represented by the same counsel. The prosecutor repeatedly warned this constituted a conflict of interest. Defense counsel insisted that both defendants were identically situated, had a common defense agreement, and had signed a waiver after being adequately advised of their rights. Without addressing either defendant, the trial court deferred to defense counsel and found the defendants had been fully advised. Both defendants were convicted. The COA vacated the convictions and remanded for new trial; ASC affirmed.

- Whether the trial court adequately ensured a defendant's right to conflict-free counsel may be raised on direct appeal and not only in PRC proceedings.
- When the trial court is advised of a potential conflict arising from an attorney's representation of a co-defendant, it must conduct an independent inquiry to confirm that the defendant's right to conflict-free counsel was waived knowingly and voluntarily.

First, ASC held that a defendant may raise issue of attorney conflict of interest in a direct appeal, rather than only through PCR proceedings. Unlike ineffective assistance of counsel issues, there is usually a sufficient record on a claim that the trial court failed to protect a defendant's right to conflict-free counsel.

Second, ASC held the trial court failed to adequately confirm that Duffy waived his right to conflict-free counsel. An attorney representing multiple defendants is

normally in the best position to assess whether a risk of conflict exists and that the defendants wish to proceed regardless. Thus, unless the trial court reasonably should know that a conflict exists, the court need not initiate an inquiry. Further, a defendant may waive the right to conflict-free counsel. But whether there is a proper waiver should be clearly determined by the trial court. Here, ASC could not approve the trial court's judgment in this case. The prosecutor's concerns placed the trial court on notice of a possible conflict and triggered the duty of independent inquiry. Instead, the trial court deferred to defense counsel's assurances and failed to conduct any meaningful inquiry into the conflict. That inquiry requires the court to ascertain the nature of the possible conflict, whether the conflict would prevent the assertion of credible independent defenses, and whether the defendant was aware of the conflict risk and its ramifications and nonetheless knowingly waived the Sixth Amendment right to conflict-free counsel. The best way for the court to determine whether a waiver is knowing and voluntary is to conduct a colloquy with defendants, which trial courts often do in other contexts involving waiver of constitutional rights. In the colloquy, the court should advise defendants of the right to conflict-free counsel, make defendants aware of the identified conflict, explain possible ramifications of the conflict, advise defendants of the right to confer about the conflict with different counsel, and ask if defendants understand the risk and wish to proceed with counsel regardless. Here, had the court conducted such an inquiry, it would have discovered the nature of the conflict and how it would have adversely affected Duffy. CR190386PR.pdf (azcourts.gov)